

**Franchise Tax Board****ANALYSIS OF ORIGINAL BILL**Author: Senate Committee on  
BudgetAnalyst: Deborah BarrettBill Number: SBX1 28Related Bills: See Legislative  
HistoryTelephone: 845-4301Introduced Date: September 19, 2008Attorney: Patrick Kusiak

Sponsor:

**SUBJECT:** Accelerate Estimate Payments/Eliminate Safe Harbor for Certain Taxpayers/Repeal Tax  
Amnesty/ 20% Corporate Understatement Penalty/Clarify Operative Date for LLC Fee Due  
Date Change.**SUMMARY**

This bill would do the following:

1. Accelerate required estimate payments.
2. Remove the option for taxpayers with specified income thresholds to use their prior year's tax amount for determining required estimate payments.
3. .Repeal Tax Amnesty provisions and penalty.
4. Enact a new corporation tax penalty for understatements of tax for taxable years beginning on or after January 1, 2003.
5. Change operative date for the requirement to estimate and pay the LLC fee of taxable years beginning on or after January 1, 2009.
6. Clarify business tax credit assignment language in AB 1452 for purposes of proper implementation of that section.

This analysis only addresses those provisions that impact Franchise Tax Board (FTB).

**PURPOSE OF THE BILL**

The purpose of the bill appears to be to address fiscal and budget related matters.

**EFFECTIVE/OPERATIVE DATE**This bill would be effective on the 91<sup>st</sup> day after adjournment of the first special session. The operative dates of the provisions vary and will be addressed separately for each provision.**POSITION**

None.

Board Position:

<input type="checkbox"/> S	<input type="checkbox"/> NA	<input type="checkbox"/> NP
<input type="checkbox"/> SA	<input type="checkbox"/> O	<input type="checkbox"/> NAR
<input checked="" type="checkbox"/> N	<input type="checkbox"/> OUA	<input type="checkbox"/> PENDING

Department Director

Date

Selvi Stanislaus

9/29/08

**ECONOMIC IMPACT - SUMMARY REVENUE TABLE**

Based on data and assumptions discussed below, the proposal would result in the following revenue gains/losses beginning in fiscal year 2008/09, with the exception of two provisions, A and E, which have their first impact in fiscal year 2007/08.

Estimated Revenue Impact of RN0828095 Effective for tax years beginning on or after 1/1/09 Enactment Assumed After September 19, 2008 (\$ in Millions)				
Item	2007/08	2008/09	2009/10	2010/11
Provision 1 – Eliminate estimated payment “safe harbor”	\$0	\$900	\$110	\$50
Provision 2 – Change in estimated payment amounts	\$0	\$1,270	\$240	\$165
Interaction of Provision 1 & 2	\$0	\$135	\$25	\$20
Provision 32 – Repeal of Amnesty 2009	-\$470	\$110	\$95	\$95
Provision 4 20% Corporation Underpayment Penalty	\$1,400	\$75	\$45	\$30
Provision 5 Change Effective Date of LLC Fee Payment	\$0	\$0	\$0	\$0
Provision 6 Clarification of Rules for Assignment of Credits	\$0	\$0	\$0	\$0
Total	\$930	\$2,490	\$515	\$360

**PROVISION 1. ACCELERATE ESTIMATE PAYMENTS AND****EFFECTIVE/OPERATIVE DATE**

This provision would be effective on the 91<sup>st</sup> day after adjournment of the first special session and operative for taxable years beginning on and after January 1, 2009.

**ANALYSIS****FEDERAL/STATE LAW**

In general, individual and corporate taxpayers are required to remit four estimated tax payments each equal to 25% of the required annual payment. Current federal and state tax law provides two options in determining the required annual payment for personal income taxes (PIT). The required annual payment for an individual subject to the personal income tax is the lesser of the following:

- Option 1: 90% of the tax shown on the return for the taxable year, or
- Option 2: 100% of the tax shown on the return of the taxpayer for the preceding taxable year.

Option 2 would not apply if the preceding taxable year was not a complete taxable year of 12 months or if the taxpayer failed to file a return for the prior tax year.

Current federal and state tax law increases the required annual payment under option 2 from 100% to 110% of the tax shown on the return if the adjusted gross income (AGI) of the taxpayer for the preceding taxable year exceeds \$150,000 (\$75,000 in the case of a married individual filing a separate return).

Current federal law generally provides two options in determining the required annual payment for corporate income taxes. The required annual payment for corporations is the lesser of the following:

- Option 1: 100% of the tax shown on the return for the taxable year, or
- Option 2: 100% of the tax shown on the return for the preceding taxable year.

Corporations with taxable income of \$1,000,000 or more are required to pay 100% of the tax for the current year.

In general, current state law requires corporations to remit four estimated tax payments totaling 100% of tax shown on the return for the taxable year. If a corporation's estimated tax does not exceed the minimum franchise tax, the entire amount of the minimum franchise tax is payable as the 1<sup>st</sup> estimated tax payment. If the amount of estimated tax exceeds the minimum franchise tax after the last day of the 3<sup>rd</sup> month and before the 1<sup>st</sup> day of the 6<sup>th</sup> month of the corporation's taxable year, the amount of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> estimated tax payments each equal 33 1/3% of the total estimated tax.

### THIS PROVISION

For taxable years beginning on or after January 1, 2009, this provision would revise the four required installments of estimated tax payments for individuals and corporations from four equal payments to the following:

- 1<sup>st</sup> quarter installment- 30% of estimated tax
- 2<sup>nd</sup> quarter installment- 30% of estimated tax
- 3<sup>rd</sup> quarter installment- 20% of estimated tax
- 4<sup>th</sup> quarter installment- 20% of estimated tax

This provision would require corporate taxpayers who are not required to make an estimate payment installment in the first quarter to make the following installment payments in subsequent quarters:

- 2<sup>nd</sup> quarter installment- 40% of estimated tax
- 3<sup>rd</sup> quarter installment- 30% of estimated tax
- 4<sup>th</sup> quarter installment- 30% of estimated tax.

### **LEGISLATIVE HISTORY**

AB 1843 (Ackerman, Stats. 2000, Ch. 862) revised references to income year to taxable year for the calculation of tax and required estimate payments.

**FISCAL IMPACT**

Implementing this provision would not significantly impact the department program or operations.

**ECONOMIC IMPACT**

Estimated Revenue Impact of Acceleration of Estimate Payment Effective for Tax Years BOA January 1, 2009 (\$ in Millions)			
Item	2008/09	2009/10	2010/11
Change in estimated payment amounts	\$1,270	\$240	\$165

Change in Estimated Payment Amounts

The revenue impact for the change in the estimate payment amounts is based on data on estimated tax payments that are forecast to be made from February through June of 2009 for PIT taxpayers and the estimated payments that are forecast to be made in April and June of 2009 for corporate taxpayers. These estimated payments total \$8.4 billion. The increase of the estimated payment rate from 25% of annual tax to 30% of annual tax represents an increase of 20%. Thus, the additional estimated payments in the first six months of 2009, assuming taxpayers fully comply with this new law, are expected to be \$1.7 billion ( $\$8.4 \text{ billion} \times 20\% = \$1.7$ ). It is assumed that compliance would only be 75% in the first year. Therefore the new revenue in 08/09 would be about \$1.27 billion ( $\$1.7 \text{ billion} \times 75\% = \text{about } \$1.27 \text{ billion}$ ). In subsequent years, we would calculate, in a similar fashion, the revenue accelerated because of increased estimated payments. However, for each subsequent year we also subtract out the decrease in payments due to the payments that had been accelerated to the prior year.

**Provision 2. REMOVE OPTION FOR CERTAIN TAXPAYERS TO USE PRIOR YEAR'S TAX WHEN CALCULATING REQUIRED ESTIMATE PAYMENT.****EFFECTIVE/OPERATIVE DATE**

This provision would be effective on the 91<sup>st</sup> day after adjournment of the first special session and operative for taxable years beginning on and after January 1, 2009.

**ANALYSIS****FEDERAL/STATE LAW**

In general, individual and corporate taxpayers are required to remit four estimated tax payments each equal to 25% of the required annual payment. Current federal and state tax law provides two options in determining the required annual payment for personal income taxes (PIT). The required annual payment for an individual subject to the personal income tax is the lesser of the following:

- Option 1: 90% of the tax shown on the return for the taxable year, or
- Option 2: 100% of the tax shown on the return of the taxpayer for the preceding taxable year.

Option 2 would not apply if the preceding taxable year was not a complete taxable year of 12 months or if the taxpayer failed to file a return for the prior tax year.

Current federal and state tax law increases the required annual payment under option 2 from 100% to 110% of the tax shown on the return if the adjusted gross income (AGI) of the taxpayer for the preceding taxable year exceeds \$150,000 (\$75,000 in the case of a married individual filing a separate return).

Current federal law generally provides two options in determining the required annual payment for corporate income taxes. The required annual payment for corporations is the lesser of the following:

- Option 1: 100% of the tax shown on the return for the taxable year, or
- Option 2: 100% of the tax shown on the return for the preceding taxable year.

Corporations with taxable income of \$1,000,000 or more are required to pay 100% of the tax for the current year.

In general, current state law requires corporations to remit four estimated tax payments totaling 100% of tax shown on the return for the taxable year. If a corporation's estimated tax does not exceed the minimum franchise tax, the entire amount of the minimum franchise tax is payable as the 1<sup>st</sup> estimated tax payment. If the amount of estimated tax exceeds the minimum franchise tax after the last day of the 3<sup>rd</sup> month and before the 1<sup>st</sup> day of the 6<sup>th</sup> month of the corporation's taxable year, the amount of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> estimated tax payments each equal 33 1/3% of the total estimated tax.

### THIS PROVISION

For taxable years beginning on or after January 1, 2009, this provision would eliminate the option for individual taxpayers to make estimate payments equal to 100% of the tax shown on the return of the taxpayer for the prior taxable year if the AGI of taxpayer shown on the return for the current taxable year exceeds \$1 million, or \$500,000 for taxpayers with a married filing separate filing status.

### **LEGISLATIVE HISTORY**

AB 1843 (Ackerman, Stats. 2000, Ch. 862) revised references to income year to taxable year for the calculation of tax and required estimate payments.

### **FISCAL IMPACT**

Implementing this provision would not significantly impact the department program or operations.

**ECONOMIC IMPACT**

Estimated Revenue Impact of Acceleration of Estimate Payment and Elimination of Safe Harbor For Calculation of Estimate Tax Payments Effective for Tax Years BOA January 1, 2009 (\$ in Millions)			
Item	2008/09	2009/10	2010/11
Eliminate estimated payment "safe harbor" for individuals with AGI \$1 million or more	\$900	\$110	\$50
Revenue attributable to Interaction of this provision with Provision 1 estimate payment provisions	\$135	\$25	\$20
Total	\$1.035	\$135	\$70

The revenue impact for this provision is based on data on large April payments in 2007. The DOF revenue forecast suggests that April payments in 2010 will be similar to the level of payments in April 2007. It was estimated from this data that \$2.5 billion in large April payments were coming from taxpayers who were relying on the 110% prior year safe harbor for estimated payments and who had income greater than \$1 million. It was assumed that 75% of these taxpayers would adjust their payment patterns so as to avoid an estimated tax penalty. Therefore, there would be \$1.9 billion in final payments under current law that would become estimated payments under this provision ( $\$2.5 \text{ billion} \times 75\% = \text{about } \$1.9$ .) One-half of this would be paid in the first two estimated payments and thus create an acceleration of revenue into 2008/09. The first year revenue number is, therefore,  $\$1.9 \text{ billion} \times 50\%$ , or about \$950 million. We then back out the payments from estates and trusts, which are exempt from this law change, and the revenue impact drops down to \$900 million in 2008/09.

In subsequent years, we calculate, in a similar fashion, the revenue accelerated because of increased estimated payments. However, for each subsequent year we also subtract out the decrease in payments due to the payments that had been accelerated to the prior year.

**Interaction Provision**

The revenue impact of each of these provisions was estimated as if each were independent of any other provision. However, if enacted together, these interact with each other and increase the revenue estimate for the bill as a whole. The interaction is estimated at \$135 million in fiscal year 2008/09, and \$25 million for fiscal year 2009/10 and \$20 million for 2010/11.

**PROVISION 3. REPEAL TAX AMNESTY****EFFECTIVE/OPERATIVE DATE**

This provision would be effective on the 91<sup>st</sup> day after adjournment of the first special session and operative on or after that date.

## ANALYSIS

### THIS PROVISION

This provision would repeal the Tax Amnesty and amnesty penalty enacted by AB 1452 of this legislative session for taxable years beginning on or after January 1, 2003, and before January 1, 2007.

## FISCAL IMPACT

Repeal of the Tax Amnesty and amnesty penalty enacted by AB 1452 of this legislative session would not impact department programs or operations.

## ECONOMIC IMPACT

Estimated Revenue Impact of Repeal of Tax Amnesty 2009			
Operative January 1, 2009			
(\$ in Millions)			
2007-08	2008-09	2009-10	2010-11
- \$470	+\$110	+\$95	+\$95

AB1452 of this legislative session creates an amnesty program. This proposal cancels that program. Since the amnesty program has not yet gone into effect, this proposal will offset all of the revenue effects projected had the amnesty taken place.

### **PROVISION 4. CORPORATION TAX PENALTY FOR UNDERSTATEMENTS OF TAX FOR TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2003.**

## EFFECTIVE/OPERATIVE DATE

This provision would be effective on the 91<sup>st</sup> day after adjournment of the first special session and by its own terms operative for taxable years beginning on and after January 1, 2003, for which the statute of limitations on assessment has not expired.

## ANALYSIS

### STATE LAW

#### Underpayment of Tax – R&TC 19132

The underpayment penalty is assessed if a corporation fails to pay the amount of the tax due by the original return due date. (Note that the automatic seven-month extension of time to file a return is not an extension of time to pay the tax due).

The underpayment penalty will not be assessed if ALL of the following requirements are met:

- An extension of time to file has been granted.
- At least 90 percent of the tax due is timely paid by the original return due date.
- The remainder of the tax due is paid by the extended due date.

The underpayment is 5 percent of the unpaid tax due on the original return due date, plus .05 percent per month of the remaining tax, not to exceed 40 months during which the **remaining tax** is greater than zero. The aggregate amount of penalty imposed by this subdivision shall not exceed 25 percent of the total unpaid tax. Once the underpayment penalty is assessed, it may be decreased in conjunction with any decrease in the assessed tax, but it may not be increased.

#### Underpayment of Estimated Tax – R&TC 19142

- A penalty is imposed on an underpayment of tax if an installment is not paid in the correct amount, or in a timely manner. The penalty is computed on the underpayment of estimated tax from the date of the payment to the earlier of the date of payment or the original due date of the return.
- The underpayment of estimated tax is the difference between the amount due for each installment of the estimated tax and the amount actually paid or credited on or before the due date of that installment.
- In the case of any underpayment of estimated tax, an addition to tax is imposed based on the interest rate, for the amount of the underpayment, for the period of the underpayment.

#### Accuracy-Related Penalty – R&TC section 19164

The Accuracy-Related Penalty may be imposed on the portion of any underpayment of tax that should be shown on the return. The penalty is generally equal to 20% of the portion of the underpayment (40% in the case of amnesty-eligible years beginning before January 1, 2003, unless the taxpayer was under audit, in protest, settlement, or appeal, or in judicial proceedings as of February 1, 2005) caused by one or more of the following:

- Negligence or disregard of rules or regulations;
- Substantial understatement of income tax;
- Substantial valuation misstatement;
- Substantial overstatement of pension liabilities; or
- Substantial estate or gift tax valuation understatement.

The statute provides relief provisions or exceptions for each of these situations. FTB will consider the relief provisions for each situation prior to assessing the penalty. A taxpayer may raise three common defenses (relief provisions) to avoid assessment of the penalty. The defenses are:

1. **Substantial Authority** - Substantial Authority exists for the tax treatment of an item on the return [Internal Revenue Code (IRC) section 6662(d)(2)(B)];
2. **Adequate Disclosure** - Adequate Disclosure of the transaction has been made on the original return [IRC Sec. 6662(d)(2)(B)]; and
3. **Reasonable Cause** - The taxpayer, in regards to the underpayment, has showed Reasonable Cause and good faith [IRC Sec. 6664(c)(1)].

Depending on the situation causing the understatement, meeting any one of these three defenses will preclude the assessment of the accuracy-related penalty. In addition, an existing Franchise Tax Board regulation provides that a taxpayer's good faith determination of the components which are a part of one or more unitary businesses and amounts that are attributable to classifying an item as business or non-business income will not be included in computing the amount of any understatement for purposes of the accuracy-related penalty.



**THIS PROVISION**

This provision would create a new strict liability penalty to be assessed against any corporation that has an understatement of tax in excess of \$1 million in any open taxable year beginning on or after January 1, 2003. In the case of taxpayers that are required or authorized to be included in a combined report, the \$1 million threshold would apply to the aggregate amount of tax liability for all taxpayers that are required or authorized to be included in the combined report.

The penalty would be calculated at 20% of the understatement of tax. For purposes of this penalty, understatement of tax means the difference between what is shown on the original return (or amended return, if filed on or before the extended due date of the original return) and what is subsequently determined to be the correct amount of tax owed. For any taxable year beginning before January 1, 2008, amounts paid on or before May 31, 2009, and reported on an amended return filed on or before May 31, 2009, are treated as the amount of tax shown on an original return. The bill would allow taxpayers to file an amended return for pre-2008 taxable years by May 31, 2009, to self-assess and pay any additional tax that might be due, thereby increasing the amount of tax treated as paid with the original return for those year(s).

The provision specifies that the penalty is in addition to any other applicable penalty and is a strict liability penalty. A credit or refund for any amounts paid to satisfy the penalty may be allowed only on the grounds that the amount of the penalty was not properly computed by FTB.

The provision would provide for limited relief from this penalty in the following circumstances:

- The understatement of tax is attributable to a change in law, a regulation, a legal ruling of counsel, or a published federal or California court decision that occurs after the earlier of either the date the taxpayer files the return for the taxable year for which the change is operative or the extended due date for the return of the taxpayer for the taxable year for which the change is operative.
- The understatement of tax is attributable to a taxpayer's reasonable reliance on written advice of the Franchise Tax Board, but only if the written advice was a legal ruling by the Chief Counsel (within the meaning of the Taxpayers' Bill of Rights).

**Fiscal Impact**

FTB estimates that the costs to implement this provision would be absorbable as the penalty would be manually assessed by audit staff.

**Economic Impact**

Estimated Revenue Impact of 20% Corporate Understatement Penalty			
Operative For Tax Years Beginning On Or After January 1, 2003			
(\$ in Millions)			
2007-08	2008-09	2009-10	2010-11
\$1,400	\$75	+\$45	+\$30

The revenue estimate for this provision is a combination of 4 effects of the proposal:

1) an acceleration of revenues from tax payments for money that would have eventually been received via the audit process; 2) tax payments of money later refunded; 3) tax payments received from taxpayers that owe money, but would not have been detected by audit; and 4) the penalty itself.

The estimate was begun by tabulating tax deposits (protective claims) made during the 2005 amnesty period. Claims in amounts greater than \$1 million for tax years 1999-2002 totaled about \$1.5 billion. Based on this tabulation, we estimated that there would have been \$400 million in tax deposits for tax year 2003 if there had been an amnesty program and the penalty had been in place. This number was then grown at a rate of 5 percent per year. For tax years 2003–2006 we reduced the amount of money affected by this proposal to account for those years for which final assessments would already have been issued by the onset of the new penalty. Because of the relative weakness in the economy and because of certain structural differences between the current proposal and the previous amnesty, we assumed that tax deposits under this proposal would be 80 percent as likely to be made as the tax deposits made under the 2005 amnesty. The 20 percent of potential deposits from taxpayers that choose not to file amended returns and make payments would be found on audit and subject to the new penalty. Tax deposits for all tax years 2003-2008 will be received in fiscal year 2008/09. We estimate, based on resolved tax deposits that California would ultimately keep 64 percent of any tax deposits made; the remainder would be refunded. Refunds are assumed to be issued within 3 years of a tax deposit. Consistent with estimates from the 2005 amnesty, we assume that 5 percent of tax deposits received in response to this proposal are revenues that we would not otherwise have received. It is assumed that penalties will be issued between 2 and 4 years after the tax year being penalized and that receipt of half of these penalties will be delayed an additional year by the protest and appeals process. In the estimate, tax deposits for tax years 2003–2007 and all penalty revenues are accrued back one year. In addition, payments required by May 31, 2009, to avoid the imposition of this new penalty for taxable years beginning on or after January 1, 2003, and before January 1, 2008, must be accompanied by an amended return self-assessing the additional tax. Consequently, these payments of taxes will not be refunded unless a taxpayer files a subsequent claim for refund.

**PROVISION 5. CHANGE THE OPERATIVE DATE FOR THE LLC FEE PAYMENTS TO TAX YEARS BEGINNING ON OR AFTER JANUARY 1, 2009.**

**EFFECTIVE/OPERATIVE DATE**

This provision would be effective on the 91<sup>st</sup> day after adjournment of the first special session and per its own terms, be operative for taxable years beginning on or after January 1, 2009.

## FEDERAL/STATE LAW

Federal law lacks provisions that require an LLC to pay an annual tax or fee.

Under current state law, an LLC not classified as a corporation must pay the \$800 annual LLC tax and the annual LLC fee if it is organized, doing business, or registered in California. The annual LLC fee is based on total income from all sources derived from or attributable to this state.

The LLC fee is due and payable on or before the 15<sup>th</sup> day of the 4<sup>th</sup> month following the close of the taxable year (e.g. April 15<sup>th</sup> for calendar year taxpayers), and is subject to underpayment penalties, late penalties, and interest.

Recently enacted AB 1452 of this legislative session, an urgency measure, included a provision that requires an LLC to pay an estimate of its LLC fee by the 15<sup>th</sup> day of the 6<sup>th</sup> month of the taxable year. In the absence of specific language to the contrary, this provision is operative as of the effective date of AB 1452. With an effective date earlier than October 15, LLCs with taxable years beginning on or after May 1, 2008, are subject to this new requirement for the 2008 taxable year.

### THIS PROVISION

This provision would clarify that the operative date for the requirement for an LLC to pay its fee by the 15<sup>th</sup> day of the 6<sup>th</sup> month is specifically operative for taxable years beginning on or after January 1, 2009.

## FISCAL IMPACT

The department would incur no costs as a result of the change in operative date for payment of the LLC fee.

## ECONOMIC IMPACT

Estimated Revenue Impact of LLC Estimate Payments Operative Date Change For Taxable Year BOA January 1, 2009 (\$ in Millions)				
Fiscal Year	2007-08	2008-09	2009-10	2010-11
LLC Fee Payment Due Date	-0-	-0-	-0-	-0-

The change in the operative date of the LLC fee acceleration provision would likely have a minimal revenue loss associated with it. Furthermore, to the extent there is a minimal revenue loss, that loss is offsetting a gain that was never considered in our analysis of AB 1452 of this legislative session. Therefore, changing the operative date does not change the revenue impact that was reflected in the analysis for AB 1452. It is likely that very few of those LLCs whose tax years began between the enactment date and 1/1/09 would have met the new LLC estimated fee payment date or would have been subject to the estimated fee penalty if they did not meet the payment due date.

**PROVISION 6. CLARIFY BUSINESS TAX CREDIT ASSIGNMENT LANGUAGE IN AB 1452  
FOR PURPOSES OF PROPER IMPLEMENTATION OF THAT SECTION.**

**ANALYSIS**

**THIS PROVISION**

This provision would further clarify the language enacted under AB 1452 of this legislative session to specify that any limitations on the allowance of any credit against the "tax" that are applicable to the taxpayer that earns certain business credits are also applicable to the allowance of any credit against the "tax" of any eligible assignee.

**FISCAL IMPACT**

This provision would not impact the department's costs.

**ECONOMIC IMPACT**

Estimated Revenue Impact of Allow Business Credits to be Assigned For Taxable Year BOA January 1, 2009 (\$ in Millions)				
Fiscal Year	2007-08	2008-09	2009-10	2010-11
Credit Limitation / Assignment of Credits	-0-	-0-	-0-	-0-

This provision clarifies the limitations on the use of assigned credits as established in AB 1452. Therefore the revenue impact of this new language is zero.

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